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REMARKS

This is a full and timely response to the outstanding non-final Office Action mailed September 21, 2006. Upon entry of the amendments in this response, claims 2 and 8 are canceled. Applicant has amended claims 1 and 7. Claims 11-13 are new. Claims 1, 3-7, and 9-13 remain pending. Reconsideration and allowance of the application and presently pending claims are respectfully requested.

Double-Patenting Rejection

The Office Action indicates that claims 1 - 10 stand provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 2-5 and 12-13 of U.S. Application Number 11/037,994.

In this regard, Applicant acknowledges the rejection. However, due to the provisional nature of the rejection, no further action is warranted at this time.

Rejections Under 35 U.S.C. §103

The Office Action indicates that claims 1 - 5 and 7 - 10 stand rejected under 35 U.S.C. §103(a) as being unpatentable over *Zdeblick et al.* ("Zdeblick," U.S. Patent No. 6,695,851) in view of *Green et al.* ("Green," U.S. Patent No. 6,332,886). The Office Action indicates that claim 6 stands rejected under 35 U.S.C. §103(a) as being unpatentable over *Zdeblick* in view of *Green* and in further view of *Goble et al.* ("Goble," U.S. Patent No. 6,565,605). Applicant respectfully traverses these rejections, and considers some rejections moot by claim amendments as detailed further below.

The Office Action (page 3, emphasis added) alleges that *Zdeblick* discloses:

... a fusion system having fusing means comprising a trochar (147), a retractor having retractor means (Col. 12, paragraph 5) and a drill (Figure 11b) having decorating means. The drill has a head at the base having a planar and extends from said head to be able to engage a facet joint.

Applicant respectfully traverses the rejections by amending claim 1. The amendments are supported by FIG. 3 and the disclosure in page 4, lines 10-21 of the present application. No new matter has been added. In this regard, Applicant has amended claim 1 to recite (emphasis added):

1. A facet fusion system for fusing a facet joint comprising:
 - a trochar arranged and configured for use during percutaneous retraction;
 - a retractor arranged and configured for use during percutaneous retraction;
 - and
 - a facet bur arranged and configured for decorticating the facet joint, said facet bur comprising:
 - a shaft being adapted releasably to engage a power source for rotation; *and*
 - a head having a planar and an extension extending from said planar;*
 - wherein said shaft extends from said planar of said head and extends from said planar in a direction opposing said extension of said head;*
 - wherein said extension is arranged and configured to engage a facet joint to taper said facet joint and said planar is arranged and configured to engage and plane a posterior surface of the facet;*
 - wherein said trochar, said retractor, and said facet bur are implemented to prepare the facet joint for fusion.

Zdeblick does not disclose a facet bur comprising "a head having a planar and an extension extending from said planar; wherein said shaft extends from said planar of said head and extends from said planar in a direction opposing said extension of said head; wherein said extension is arranged and configured to engage a facet joint to taper said facet joint and said planar is arranged and configured to engage and plane a posterior surface of the facet;" as recited in claim 1.

Rather, it appears that *Zdeblick* (Col. 11, ln. 19 and Figure 11b) describes a drill that uses a *non-tapered bit* "to drill out circular openings in the adjacent vertebral bodies." This drill does

not appear to *be arranged and configured to engage a facet joint to taper said facet joint and said planar is arranged and configured to engage and plane a posterior surface of the facet.*

Applicant respectfully asserts that *Zdeblick* is legally deficient for the purpose of anticipating claim 1.

In particular, Applicant respectfully asserts that *Zdeblick* does not teach or otherwise disclose at least the features/limitations emphasized above in claim 1. That is, *Zdeblick* does not disclose in any respect:

a head having a planar and an extension extending from said planar;
wherein said shaft extends from said planar of said head and extends from said planar in a direction opposing said extension of said head;
wherein said extension is arranged and configured to engage a facet joint to taper said facet joint and said planar is arranged and configured to engage and plane a posterior surface of the facet;

as recited in claim 1. Additionally, *Green* does not remedy this deficiency.

Therefore, Applicant respectfully asserts that claim 1 is allowable over *Zdeblick* in view of *Green* and is in condition for allowance. Since claims 3-5 are dependent claims that incorporate all the features/limitations of claim 1, Applicant respectfully asserts that claims 3-5 are also in condition for allowance. Additionally, claims 3-5 recite other features/limitations that can serve as an independent basis for patentability.

Additionally, the Office Action (page 3, emphasis added) alleges that *Zdeblick* discloses "... a sizing means for determining the appropriate implant (Col. 20, Paragraph 2 and 3). . . ." Applicant respectfully traverses this allegation.

Claim 3 and 4 recite (emphasis added):

3. The facet fusion system of claim 1, further comprising:
a facet sizer arranged and configured to aid in the determination of an appropriate size implant to be inserted into the facet joint to facilitate fusion.
4. The facet fusion system of claim 3, wherein said *facet sizer comprises:*
a body portion; and
a handle extending from said body portion;
wherein said body portion is arranged and configured to aid in the determination of an appropriate size implant to be inserted into the facet joint to facilitate fusion.

Applicant respectfully submits that *Zdeblick* (Col. 14, ln. 25-29, emphasis added) appears to describe a procedure using "distractor tips" that:

progressively larger distractor tips are sequentially inserted in alternating fashion into each of the bilateral holes in the disc space and annulus until the annulus is taut and the adjacent vertebrae are adequately distracted for restoration of a proper disc space height.

Applicants submit that the distractor tips described in *Zdeblick* do not appear to be a facet sizer that comprises the features of: "a body portion; and a handle extending from said body portion; wherein said body portion is arranged and configured to aid in the determination of an appropriate size implant to be inserted into the facet joint to facilitate fusion" as recited in claim 4. Additionally, *Green* does not remedy this deficiency. Thus, Applicants respectfully submit that for at least these reasons, claims 3-4 are allowable.

Claim 7 is also amended by adding the same features/limitations in claim 1. It is therefore believed that claim 7 is also substantially different from *Zdeblick* and is in condition for allowance. Since claims 9-10 are dependent claims that incorporate all the features/ limitations of claim 7, Applicant respectfully asserts that claims 9-10 are also in condition for allowance. Additionally, claims 9-10 recite other features/limitations that can serve as an independent basis for patentability.

Reconsideration of the rejections of claims 1-5, 7, and 9-10 is hereby requested.

As explained above, independent claim 1 is allowable over *Zdeblick* in view of *Green*. Also, Applicants respectfully submit that *Goble* does not remedy these deficiencies. Since claim 6 incorporates all the features of independent claim 1, Applicants respectfully submit that *Zdeblick* in view of *Green* in further view of *Goble* fails to disclose, teach, or suggest at least the above-emphasized features of claim 1 as incorporated into claim 6. Accordingly, Applicants respectfully request that the rejection to dependent claim 6 be withdrawn.

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CONCLUSION

Favorable consideration and allowance of the present application and all pending claims are hereby courteously requested. If, in the opinion of the Examiner, a telephonic conference would expedite the examination of this matter, the Examiner is invited to call the undersigned attorney at (770) 933-9500.

Respectfully submitted,


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